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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 YVONNE THOMAS MOORE,) NO. CV 17-3933-E
12 Plaintiff,)
13 v.) MEMORANDUM OPINION AND
14 NANCY A. BERRYHILL, Acting) ORDER OF REMAND
15 Commissioner of Social)
16 Security)
17 Defendant.)
18

19 Pursuant to sentence four of 42 U.S.C. section 405(g), IT IS
20 HEREBY ORDERED that this matter is remanded for further administrative
21 action consistent with this Opinion.
22

23 PROCEEDINGS
24

25 Plaintiff filed a Complaint on May 25, 2017, seeking review of the
26 Commissioner's denial of disability benefits. The parties filed a
27 consent to proceed before a United States Magistrate Judge. See
28 Statements of Consent, filed June 19, 2017 and July 21, 2017.

1 On March 6, 2018, the parties filed a "Joint Stipulation." On
2 April 25, 2018, this case was reassigned to Magistrate Judge Charles F.
3 Eick.

4 5 **BACKGROUND**

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7 Plaintiff, a former home care provider and customer service
8 representative, asserts disability since June 1, 2012, based on, inter
9 alia, alleged fibromyalgia (Administrative Record ("A.R.") 30-43, 192,
10 207, 314-15, 684-85). A treating physician diagnosed fibromyalgia
11 after finding 14 of 18 "trigger points" (A.R. 684-85). Plaintiff
12 testified to pain, fatigue and other symptomatology of allegedly
13 disabling severity (A.R. 76-77, 96-97).

14
15 An Administrative Law Judge ("ALJ") denied Plaintiff's claim (A.R.
16 30-45). In doing so, the ALJ found that Plaintiff's alleged
17 fibromyalgia is "not a medically determinable impairment" (A.R. 35).
18 The ALJ discounted the credibility of Plaintiff's subjective
19 allegations based on, among other things, an asserted lack of objective
20 evidence to substantiate those allegations (A.R. 42). The Appeals
21 Council denied review (A.R. 1-4).

22 23 **STANDARD OF REVIEW**

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25 Under 42 U.S.C section 405(g), this Court reviews the
26 Administration's decision to determine if: (1) the Administration's
27 findings are supported by substantial evidence; and (2) the
28 Administration used correct legal standards. See Carmickle v.

1 Commissioner, 533 F.3d 1155, 1159 (9th Cir. 2008); Hoopai v. Astrue,
2 499 F.3d 1071, 1074 (9th Cir. 2007). Substantial evidence is "such
3 relevant evidence as a reasonable mind might accept as adequate to
4 support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971)
5 (citation and quotations omitted); see Widmark v. Barnhart, 454 F.3d
6 1063, 1067 (9th Cir. 2006).

7
8 If the evidence can support either outcome, the court may not
9 substitute its judgment for that of the ALJ. But the Commissioner's
10 decision cannot be affirmed simply by isolating a specific quantum of
11 supporting evidence. Rather, a court must consider the record as a
12 whole, weighing both evidence that supports and detracts from the
13 [administrative] conclusion.

14 15 **DISCUSSION**

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17 Substantial evidence fails to support the ALJ's finding that
18 Plaintiff's alleged fibromyalgia is not a medically determinable
19 impairment. The ALJ stated that "there is an absence of clinical
20 evidence satisfying the criteria of [Social Security Ruling] 12-2 for
21 the establishment of fibromyalgia" (A.R. 35). As Plaintiff points out,
22 the clinical evidence of record refutes this statement. See Joint
23 Stipulation at 5-8; A.R. 684-85; see also Buell v. Berryhill, 716 Fed.
24 App'x 600, 601-02 (9th Cir. 2017); Allen v. Colvin, 2016 WL 7368128, at
25 *3 (W.D. Wash. Jan. 8, 2016), adopted, 2016 WL 7368129 (W.D. Wash. Feb.
26 8, 2016).

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1 Defendant's contentions regarding this issue as set forth in the
2 Joint Stipulation do not attempt to defend the ALJ's failure to find
3 Plaintiff's alleged fibromyalgia to be a medically determinable
4 impairment (Joint Stipulation at 8-9). Rather, Defendant contends that
5 any error in this regard was harmless because the ALJ found other
6 alleged impairments to be severe (id.). Defendant appears to argue
7 that the ALJ necessarily considered the effects of Plaintiff's alleged
8 fibromyalgia when defining Plaintiff's residual functional capacity,
9 despite having found the alleged fibromyalgia not to be a medically
10 determinable impairment (id.). As discussed below, this apparent
11 argument must be rejected for at least two independently sufficient
12 reasons.

13
14 First, Defendant confuses a failure to find that an alleged
15 impairment is medically determinable with a failure to find that a
16 medically determinable impairment is severe. In assessing residual
17 functional capacity, the Administration must consider all medically
18 determinable impairments, even those deemed not severe. 20 C.F.R. §
19 404.1545(a)(2). However, in assessing residual functional capacity,
20 the Administration considers only medically determinable impairments.
21 See id.; Butler v. Colvin, 2016 WL 8232243, at *4-5 (E.D. Wash. Aug.
22 23, 2016) ("the ALJ found Plaintiff's fibromyalgia was not medically
23 determinable. . . . Consequently, the ALJ did not incorporate
24 Plaintiff's alleged limitations from her fibromyalgia into the RFC
25 [residual functional capacity] finding. . . . [B]y classifying
26 Plaintiff's fibromyalgia as a non-medically determinable impairment -
27 rather than a severe or non-severe impairment - the ALJ excluded the
28 effects of this condition when formulating Plaintiff's RFC, rendering

1 the ALJ's RFC finding suspect") (citations and quotations omitted).
2 Therefore, the ALJ did not consider the effects of Plaintiff's alleged
3 fibromyalgia when defining Plaintiff's RFC. See id.; see also A.R. 40.
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5 Second, the ALJ's error may well have affected the ALJ's
6 assessment of Plaintiff's credibility. The ALJ rejected Plaintiff's
7 testimony regarding allegedly disabling symptomatology in part because
8 of an asserted lack of support from the objective medical record. If
9 the ALJ had found Plaintiff's alleged fibromyalgia to be a medically
10 determinable impairment, an impairment with which some of Plaintiff's
11 allegedly disabling symptomatology sometimes is associated, the ALJ may
12 have viewed the credibility of Plaintiff's testimony in a materially
13 different light. See, e.g., Buell v. Berryhill, 716 Fed. App'x at 602
14 ("the ALJ arrived at his adverse credibility finding after first
15 determining at Step Two that Buell did not have a fibromyalgia-related
16 severe MDI [medically determinable impairment]. If the ALJ had in
17 front of him a valid diagnosis of fibromyalgia, it stands to reason
18 that Buell's symptoms and behavior would have appeared in a different
19 and more favorable light. Accordingly, we vacate the ALJ's adverse
20 credibility finding without prejudice to revisiting this issue on
21 remand"); Kerley v. Berryhill, 2017 WL 3128390, at *4 (W.D. Wash. July
22 24, 2017) (failure to find fibromyalgia to be a medically determinable
23 impairment not harmless where "[p]art of the rationale for the ALJ's
24 failure to credit fully Plaintiff's allegations was that the medical
25 evidence is not consistent with those allegations . . ."); Allen v.
26 Colvin, 2016 WL 7368128, at *4 ("If Plaintiff's fibromyalgia had been
27 properly considered, the ALJ may have found Plaintiff's testimony
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1 regarding her pain, fatigue, and ability to function more credible,
2 which may have impacted the RFC determination").

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4 Thus, the Court is unable to deem the errors in the present case
5 to have been harmless. See Molina v. Astrue, 674 F.3d 1104, 1115 (9th
6 Cir. 2012) (an error "is harmless where it is inconsequential to the
7 ultimate non-disability determination") (citations and quotations
8 omitted); McLeod v. Astrue, 640 F.3d 881, 887 (9th Cir. 2011) (error
9 not harmless where "the reviewing court can determine from the
10 'circumstances of the case' that further administrative review is
11 needed to determine whether there was prejudice from the error").

12
13 Remand is appropriate because the circumstances of this case
14 suggest that further administrative review could remedy the errors
15 discussed herein. McLeod v. Astrue, 640 F.3d at 888; see also INS v.
16 Ventura, 537 U.S. 12, 16 (2002) (upon reversal of an administrative
17 determination, the proper course if remand for additional agency
18 investigation or explanation, except in rare circumstances); Dominquez
19 v. Colvin, 808 F.3d 403, 407 (9th Cir. 2015) ("Unless the district
20 court concludes that further administrative proceedings would serve no
21 useful purpose, it may not remand with a direction to provide
22 benefits"); Treichler v. Commissioner, 775 F.3d 1090, 1101 n.5 (9th
23 Cir. 2014) (remand for further administrative proceedings is not the
24 proper remedy "in all but the rarest cases"); Harman v. Apfel, 211 F.3d
25 1172, 1180-81 (9th Cir.), cert. denied, 531 U.S. 1038 (2000) (remand
26 for further proceedings rather than for the immediate payment of
27 benefits is appropriate where there are "sufficient unanswered
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1 questions in the record"). There remain significant unanswered
2 questions in the present record.

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4 **CONCLUSION**

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6 For all of the foregoing reasons, the decision of the Commissioner
7 is reversed in part and this matter is remanded for further
8 administrative action consistent with this Opinion.

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10 LET JUDGMENT BE ENTERED ACCORDINGLY.

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12 DATED: May 7, 2018.

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15 _____/s/_____
16 CHARLES F. EICK
17 UNITED STATES MAGISTRATE JUDGE
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